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Although there are grave questions whether the proposed amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution, we are of the view that it would be more appropriate to pass on these questions after the election, should the proposed amendment be adopted, than to interfere with the power of the people to propose laws and amendments to the Constitution, and to adopt or reject the same at the polls. (See Cal. Const., art. IV, § 1; Wind v. Hite, 58 Cal. 2d 415, 417.)

The petition for writ of mandamus is denied. Peters, J. and Tobriner, J. are of the view that the petition should be granted.[1]

WITH THOSE WORDS, the California Supreme Court left to the voters of this State the decision as to whether there ever will be a final adjudication of the many legal questions raised by Proposition 14. *Lewis v. Jordan* arose from a petition for a writ of mandamus to prevent the California Secretary of State from placing Proposition 14 on the ballot. The petitioner argued that its passage and subsequent application would violate the federal and California constitutions.

The court's decision to permit a vote on Proposition 14 will afford the people of California an opportunity to evaluate the serious *social* and *moral* questions which the measure encompasses. The majority of the public opposition to the measure is based upon the belief that discrimination in housing is detrimental to the health and growth of our State and is inherently unjust. In addition, the opponents have pointed out that, while the avowed purpose of the measure is to repeal the Rumford Fair Housing Act,[2] it would have the much broader harmful effect of permanently foreclosing the legislature and all other arms of state and local government from acting against discrimination in housing.

The authors agree without reservation with both of the foregoing

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1 Lewis v. Jordan, Sac. No. 7549, Cal. Sup. Ct., June 3, 1964.

2 CAL. HEALTH & SAFETY CODE §§ 35700-44.

points and realize that the election battle will be fought on basic moral grounds.[3] However we also believe that it will be helpful for the bar to be familiar with the more important *legal* issues raised by the measure. A brief survey of those legal issues is the sole purpose of this article.[4]

The text of the proposed amendment, to be added as section 26 of article I of the constitution of the State of California, reads as follows:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.
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> "Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.
>
> "Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.
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> This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this constitution, nor to the renting or providing of any accommodation for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.
>
> If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable.[5]

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[3] The proponents of the measure base their moral case upon the purported inviolability of private property rights. Refutation of the claim of inviolability is well articulated in Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135 (1963).

[4] No attempt is made here to exhaustively analyze all issues raised by Proposition 14. Further, the general subject of "state action" violative of the fourteenth amendment is not discussed. That subject has been treated extensively recently by a number of authors and four of the better works are Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

[5] Proposition 14—"Sales and Rentals of Residential Real Property;" qualified for ballot February 24, 1964.

Problems Under the California Constitution

Since Proposition 14, if passed, will be a part of the California constitution, it is doubtful that it may be invalid because of any conflict with other substantive provisions of that constitution, as it would supersede any earlier enacted provisions with which it was in conflict. Rather, the attacks on the measure based on the California constitution relate to the procedure set forth in that constitution for its amendment.

There are two attacks. First, that under the rule of *McFadden v. Jordan*[6] Proposition 14 constitutes a revision of, rather than an amendment to, the California constitution and does not comply with procedures set forth in article XVIII for revision of that instrument.[7] Second, that the measure relates to more than one subject and therefore contravenes article IV, section 1c of that constitution, which requires that constitutional amendments "shall relate to but one subject."[8]

In *Livermore v. Waite*[9] the supreme court enjoined the submission of a proposed constitutional amendment to the voters. If passed, the proposed amendment would have deleted a constitutional provision that Sacramento was the seat of the California government and added in its stead a provision that San Jose was the governmental seat. However, it would not have become operative until the State had received a donation of ten acres of land and one million dollars. The court held that constitutional amendments must become operative parts of the constitution upon adoption, and, therefore, the proposed amendment was invalid. In the course of its opinion the court stated, "The significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was famed."[10]

McFadden v. Jordan[11] involved a proposed amendment to the California constitution that was almost half as long as the entire constitution, and, by the court's own count, would have repealed or substantially altered fifteen of the twenty-five articles in the constitution. The supreme court enjoined the submission of the proposed amendment to the voters on the ground that it was a revision of, rather than an amendment to, the constitution and the revision procedure had not been complied with. The court quoted the language above from *Livermore* and said that rather than fitting within the

[6] 32 Cal. 2d 330, 196 P.2d 787 (1948).
[7] CAL. CONST. art. XVIII, § 2.
[8] CAL. CONST. art. IV, § 1c.
[9] 102 Cal. 113, 36 Pac. 424 (1894).
[10] *Id.* at 118-19, 36 Pac. at 426.
[11] 32 Cal. 2d 330, 196 P.2d 787 (1948).

criteria set forth in that language, the proposed amendment constituted a revision because the effect of its adoption "would be to substantially alter the purpose and to attain objectives clearly beyond the lines of the Constitution as now cast."[12]

Opponents of the measure, relying on *McFadden*, say that Proposition 14 would divest California legislature, courts, and executives of the police power possessed by them under the present constitution pursuant to which they can deal and have dealt with the field of discrimination in housing. They argue that such a divestiture would constitute a fundamental change in the purposes and objectives of the California constitution and would be a revision requiring compliance with the provisions for the adoption of revisions.

Supporters of Proposition 14, on the other hand, view the measure as one which does not change any purpose or objective of the constitution, but simply declares that the State shall not interfere with the right of persons to freely dispose of their property as they choose.

The second procedural argument raised against the measure is based on the language of the California constitution which provides that constitutional amendments "shall relate to but one subject."[13] Opponents take the position that the measure most certainly will result in legal effects beyond those relating to private discrimination in housing and thereby will clearly affect more than one subject.[14] Supporters of the measure stress that these alleged legal effects are fancied rather than real and are the results of erroneous constructions of its language. They assert that the subject dealt with by Proposition 14 is simply the right of the owner of real property to sell or not to sell as he chooses, and therefore there is but one subject embraced by it.

The California Supreme Court, in denying the petition for a writ of mandate in *Lewis v. Jordan*,[15] made no mention of the two procedural arguments advanced under the California constitution. The opinion recognized problems only under the fourteenth amendment, did not discuss or distinguish the *McFadden* case, and spoke of the "proposed amendment."[16] However, the procedural arguments were not specifically rejected, and it may be expected that, should Proposition 14 be adopted, the court will be called on once again to deal with those arguments.

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[12] *Id.* at 350, 196 P.2d at 799.

[13] CAL. CONST. art. IV, § 1c.

[14] See discussion *infra* p. 17.

[15] Sac. No. 7549, Cal. Sup. Ct., June 3, 1964.

[16] *Id.* (Emphasis added.)

Problems Under the Federal Constitution

A number of arguments based upon the federal constitution have been raised against Proposition 14. If valid, some would affect it only as applied to particular fact situations, while others would void the measure in its entirety regardless of any specific applications. The arguments are discussed below.

Duty of State To Protect Inhabitants Against Private Discrimination

Opponents of Proposition 14 argue that it is inherently violative of the fourteenth amendment in that its passage would preclude the State from protecting those within its jurisdiction against private infringement of their civil rights. They argue that, although the guaranties of the fourteenth amendment are directed against state action, the state can act by allowing private individuals to infringe such guaranties. The conclusion urged is that the amendment "fairly imports an obligation on the State to see to it that those over whom it has control do not bring about what for practical purposes are the same effects as would be produced by a violation of the Amendment by the State."[17] It is argued that "there is no practical difference, either to the person discriminated against or to the policy of the nation, whether a denial of constitutional rights on account of race or color is brought about directly by the State, or, without let from the State, by the action of private individuals."[18]

In support of their arguments, opponents of Proposition 14 rely on several categories of decisions: (a) the so-called "affirmative integration" cases, which require governmental correction of racial imbalance in schools even though the imbalance was not caused by government action;[19] (b) the "white primary" cases in which a violation of the fifteenth amendment was found in the state's failure to afford Negroes equal voting rights;[20] (c) the "custody-protection" cases in which a duty has been imposed upon state officials to protect

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[17] Brief of Joseph A. Ball and Herman F. Selvin as Amici Curiae, p. 12, Lewis v. Jordan, Sac. No. 7549, Cal. Sup. Ct., June 3, 1964.

[18] *Id.* at 13.

[19] Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). *Contra,* Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 84 Sup. Ct. 1223 (1964) (no affirmative constitutional duty to change innocently arrived at school districts).

[20] Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

persons in their custody against injurious acts by private persons.[21] They also rely on *Truax v. Corrigan*[22] which held a state prohibition against issuance of injunctions in labor disputes to be violative of both the due process and equal protection guaranties of the fourteenth amendment.

The opponents rest their argument on the principle that "the right to be immune from racial discrimination is one of the 'unalienable rights' guaranteed by the Fourteenth Amendment."[23] They then cite the following language:

> The states are under a duty to make and enforce laws which provide an individual with an effective remedial process for interference with his civil rights. The states violate this duty when, through non-action, they fail to provide such a remedy. This failure is a denial of equal protection of the laws.[24]

Critics of the foregoing argument claim that it ignores the legal limitations on the terms "civil rights" and "constitutional rights." They state that the Supreme Court long has held that there is no "constitutional right" or "civil right" to be free from *private* discrimination.[25] Thus it is argued that although the states may have a duty to protect their citizens against infringement of their constitutional rights, that duty is only coextensive with the rights being infringed. Any other conclusion, they add, would accomplish by indirection what the fourteenth amendment, as interpreted in the *Civil Rights Cases*,[26] does not accomplish directly.

Critics of the argument also claim that none of the decisions cited by the opponents are applicable to Proposition 14. They point out that the "affirmative integration" cases, also known as "*de facto* segregation" cases, and the "white primary" cases concern subjects which are primarily government functions rather than private activities and thereby fit within the traditional framework of the "state action" principle, which is not relevant to Proposition 14. A similar argument is made with respect to the "custody-protection" cases, in that in each of such cases the state placed the injured party in a position of jeopardy

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[21] Lynch v. United States, 189 F.2d 476 (5th Cir. 1951); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).

[22] 257 U.S. 312 (1921).

[23] Brief of Joseph A. Ball and Herman F. Selvin as Amici Curiae, p. 20, Lewis v. Jordan, Sac. No. 7549, Cal. Sup. Ct., June 3, 1964.

[24] Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303, 328 (1959).

[25] Civil Rights Cases, 109 U.S. 3 (1883).

[26] *Ibid.*

and prevented his escape of his own volition. Thus the failure of the state to protect him from that jeopardy constitutes "state action."

The *Truax*[27] decision is sought to be distinguished on several grounds. First, the Court laid great stress upon the inherent illegality of the private action immunized by the legislation then under review. Second, the Court was greatly concerned with the legislature's attempt to destroy a traditional common law remedy. Third, the Court, disapproving the limitation of the application of the statute to labor disputes, found that limitation to be a "purely arbitrary and capricious exercise" of the power of the state.[28] Further, it has been argued that the dissents in the *Truax* case are more powerful and well reasoned than the majority opinion.[29]

Finally, critics of the argument claim that the opponents' theory, if carried to its logical conclusion, would invalidate the current exceptions in the Rumford Act[30] and similar legislation, since the State in those cases has denied protection against private discrimination to those desiring housing in the exempted classes of dwellings. Similarly, they say that the opponents' argument leads to the conclusion that it is unconstitutional for a state not to have any fair housing law at all.

State Authorization of Private Discrimination

A second constitutional argument raised against Proposition 14 is that its *passage* would violate the equal protection guaranty of the fourteenth amendment. The argument depends upon the assumption that the measure "sanctions" or "encourages" private discrimination and thereby constitutes state action.

Opponents of Proposition 14 state that the nexus with the State in the instant case is sufficient to contravene the fourteenth amendment. They cite an early Supreme Court case, *McCabe v. Atchison, T. & S.F. Ry.*,[31] in which the Court examined a state statute which *permitted* railroad companies to provide sleeping, dining, and chair cars only to white travelers. The Court stated that the carrier, in denying such facilities to Negroes, would have been acting under "the authority of

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[27] 257 U.S. 312 (1921).

[28] *Id.* at 329.

[29] In Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1, 9 (1964) the author comments on the *Truax* decision, stating "its holding on the constitutional issue which was involved is no longer sound . . . ."

[30] See, *e.g.*, CAL. HEALTH & SAFETY CODE § 35720(5) exempting dwellings with four units or less from the Act.

[31] 235 U.S. 151 (1914).

a state law,"[32] and thereby would have been violating the fourteenth amendment. It is urged that Proposition 14 is analogous to the statute in the *McCabe* case because it authorizes private discrimination, and consequently such discrimination would be under the authority of state law.

The case of *Burton v. Wilmington Parking Authority*[33] is also cited in opposition to the measure. In *Burton* the Court reviewed a Delaware statute which provided that a restaurant could refuse to serve "persons whose reception or entertainment . . . would be offensive to the major part of [its] customers."[34] Mr. Justice Stewart, in a concurring opinion, took the position that the Delaware Supreme Court, in upholding a restaurant operator's right to deny service to the appellant solely because of his race, had relied upon that statute. He then stated, "The highest court of Delaware has thus construed this legislative enactment as *authorizing* discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment."[35] Justices Harlan, Whittaker, and Frankfurter, in dissenting, stated that if they could agree that the Delaware court had construed the statute as *authorizing* discriminatory classification based exclusively on color rather than as a mere declaration of the common law, they would reverse on the ground stated by Mr. Justice Stewart. Justice Frankfurter stated, "For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws in violation of the Fourteenth Amendment."[36]

Thus, two members of the present Court who did not join in the majority's ground[37] for decision would have found state action where a statute was interpreted as *authorizing* or *permitting* discrimination rather than as a mere restatement of the common law. Perhaps, then, had the majority been able to read the Delaware court opinion in the same light as Mr. Justice Stewart, they too would have agreed with him.

It is argued, then, that the Supreme Court would interpret Proposition 14 as an authorization by the State to private persons to discriminate solely on the basis of race.[38] In support of this contention, it

[32] *Id.* at 162.
[33] 365 U.S. 715 (1961).
[34] *Id.* at 726 (concurring opinion).
[35] *Id.* at 726-27 (concurring opinion).
[36] *Id.* at 727 (dissenting opinion).
[37] See p. 14 *infra.*
[38] Opponents of the measure also cite the "white primary" cases, cited note 19

is argued that the context of the enactment of the measure, as shown by the campaign statements made on both sides, demonstrates that the enactment would be for the purpose of *authorizing* private discrimination. It is also argued that the obvious effect of the measure will be private discrimination and that this demonstrates its purpose. It is asserted that legislation, however fair on its face, may be shown by the context of its enactment or by its practical effect to be designed for the purpose of denying constitutionally protected rights and therefore to be unlawful state action.[39]

Supporters of Proposition 14 reply that its passage would merely be a declaration of *neutrality* by the State with respect to private discrimination. They state that neither the measure itself, nor combined with any other planned or likely action by the State, demands, effects, brings about or even encourages racial or other discrimination. They argue that the measure accomplishes nothing more than would the repeal of the Rumford Act, which repeal would not violate the fourteenth amendment.[40] Further, they urge an interpretation of the measure as being a mere declaration of the common law and take refuge in the characterization of the Delaware law by Justices Harlan, Whittaker, and Frankfurter in the *Burton* case.

Supporters also reply that there is a general proposition of law which is aptly stated by Mr. Justice Cardozo that "there is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful."[41] They argue that the cases cited by the opponents do not contradict this doctrine because they all involve measures which, either on their face or in their *obvious* effect, were designed to accomplish improper legislative ends. Proposition 14, they argue, clearly does not involve either situation. They argue further that in none of the cited cases was the "motive" of the legislature examined by reference to statements of individual legislators. They urge that to impute to the electorate approving Proposition 14 a purpose of discrimination on the basis of inflammatory cam-

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supra, as establishing that a state "acts" in violation of the fourteenth amendment when it permits private organizations to discriminate against Negroes. However, the organizations in those cases were performing a governmental function, *i.e.*, holding elections.

[39] See Griffin v. County School Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Avery v. Georgia, 345 U.S. 559 (1953); Lane v. Wilson, 307 U.S. 268 (1939); United States v. Constantine, 296 U.S. 287 (1935); Child Labor Tax Case, 259 U.S. 20 (1922); Guinn v. United States, 238 U.S. 347 (1915).

[40] *But see* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 483 n.20 (1962) suggesting that it may be state action contravening the fourteenth amendment when a state repeals existing antidiscrimination legislation.

[41] United States v. Constantine, 296 U.S. 287, 299 (dissenting opinion).

paign statements is absurd reasoning, wholly unsupported by prior judicial decision.

Another approach to the argument that the State would be "sanctioning" private discrimination and thus "acting" requires the artful utilization of the doctrine of *Shelley v. Kraemer*.[42] That case involved a Negro who purchased real property from an owner in violation of a private racially restrictive covenant. The Court held that a state court would be engaging in state action prohibited by the fourteenth amendment if it enforced the private covenant so as to void the Negro's title. The *Shelley* case has been interpreted in *Abstract Inv. Co. v. Hutchinson*[43] as meaning that the granting of judgment for the plaintiff-lessor in an unlawful detainer action without hearing the defendant-lessee's allegation that the real purpose of the action was racial discrimination would constitute state action similar to that prohibited by *Shelley*. It is argued that an action brought after the passage of Proposition 14 based upon the Rumford or Unruh Acts could not be defended on the ground that passage of the measure had nullified those statutes because the court's recognition of such a defense would be state action in violation of the fourteenth amendment. Proponents of the measure counter that such an argument could as logically be applied to a suit brought in a state which did not grant affirmative rights to plaintiffs under nondiscrimination statutes. They argue that it would be absurd to hold that dismissal of the suit in such a state would be state action in violation of the fourteenth amendment.

Authorization of Discrimination by Quasi-Governmental Parties

A third federal constitutional argument raised against the measure is that it can be *applied* to permit discrimination by parties so closely connected to the State that their discrimination constitutes "state action."[44] Opponents of Proposition 14 point out that the measure exempts the State (and its subdivisions) only insofar as it is a "person" and "person" in the context of the measure means "party to the discriminatory transaction." Further, the subject of the transaction, "real property," remains the subject "irrespective of how obtained or financed." Thus the State may be related to a discriminatory transaction in any way other than as a party, *e.g.*, as the lessor of "real property." The measure arguably would permit the State's lessee to

[42] 334 U.S. 1 (1948).

[43] 204 Cal. App. 2d 242. 22 Cal. Rptr. 309 (1962).

[44] See generally Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1 (1964).

discriminate with respect to the sale, sublease or rental of the leasehold interest. And, if the initiative is viewed as limiting contractual relationships, the State might even be prevented from inserting a nondiscrimination clause in the lease.

It is well established law that discrimination against persons on account of their race violates the fourteenth amendment when such discrimination is exercised in connection with state-owned property.[45] Drafters of the measure obviously recognized that principle, and they sought to exempt such property from the operation of the measure. However, the opposition urges that the drafters did an incomplete job and that, as a result, the measure is subject to attack as applied to certain private parties acting in quasi-public status.

For example, in *Ming v. Horgan*[46] it was held that a private developer who was licensed and inspected by the State and who, as advertised, secured for purchasers of his homes mortgage financing guaranteed by the FHA, was required under the fifth and fourteenth amendments to pursue a policy of nondiscrimination. The court reasoned that by virtue of the benefits enjoyed by the developer as a result of federal and State participation, the project should be treated as one conducted by the federal and State governments themselves and subject to the same nondiscrimination requirements. This holding would appear equally applicable whether State or federal financing was involved.[47] Authority to the contrary such as *Dorsey v. Stuyvesant*

[45] New Orleans City Park Improvement Assoc. v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (busses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Baltimore Mayor & City Council v. Dawson, 350 U.S. 877 (1955) (beaches); Brown v. Board of Educ., 347 U.S. 483 (1954) (schools).

[46] 3 RACE REL. L. REP. 693 (Cal., Super. Ct. 1958).

[47] Executive Order No. 11063, 27 Fed. Reg. 11527 (1962), contemplates that private real estate developers whose projects have in whole or in part been assisted by the federal government will enter into agreements requiring them to pursue a nondiscriminatory policy. It has been argued that Proposition 14 would prohibit a California court from enforcing such obligations if an action based thereon was brought by either the United States or a third party beneficiary. In such circumstances, the refusal of the California court to act might violate the doctrine of Testa v. Katt, 330 U.S. 386 (1947). That case held that a refusal by a state court to entertain a federally-created right of action violated the supremacy clause of the federal constitution. Supporters of the measure argue that California courts would not be prohibited from enforcing such contractual rights by Proposition 14, because the developers, by entering into such contracts, would thereby have waived their right to exercise their "absolute discretion" as to whom to sell or rent. The effect upon Executive Order No. 11063 of section 602 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 88th Cong., 2d Sess. (July 2, 1964) is not clear. Section 602 expressly excludes from the term "Federal financial assistance," a "contract of insurance or guaranty" such as in FHA and VA programs. The exclusion could be interpreted to prohibit the cognizant executive agencies from promulgating and enforcing anti-discrimination programs with respect to FHA and VA projects.

Town Corp.[48] is arguably no longer valid law in view of *Burton v. Wilmington Parking Authority.*[49] In *Burton* the state agency owned real property and leased part of the premises to a private lessee who operated a restaurant therein. The lessee discriminated in his service on the basis of race; the Court held that the action of the lessee was the action of the state and therefore a denial of the equal protection guaranteed by the fourteenth amendment. The majority opinion stated:

> By its inaction . . . the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle [lessee] that it must be recognized as a joint participant in the challenged activity . . . .[50]

The potential breadth of the *Burton* case is illustrated by the recent case of *Simkins v. Moses H. Cone Memorial Hosp.*[51] The court held that the state's involvement in the federal Hill-Burton Act[52] subjected participating "private" hospitals to the fourteenth amendment's ban on racial discrimination. The court found state action in the fact that the "hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health."[53] Although the court was careful to say that not "every subvention by the federal or state government automatically involves the beneficiary in 'state action,' "[54] it is not difficult to find the same involvement by the state and federal governments in redevelopment, urban renewal, and other real property programs.

Even more recently decided was *Eaton v. Grubbs.*[55] That case held that a corporation which operated a hospital under a grant of the hospital building and land from the state pursuant to a deed which provided for reversion to the state in the event the hospital was not maintained was so closely connected to the state that its action should be considered state action for fourteenth amendment purposes. The court pointed out that the state had supplied construction funds for

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[48] 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied,* 339 U.S. 981 (1950).
[49] 365 U.S. 715 (1961).
[50] *Id.* at 725.
[51] 323 F.2d 959 (4th Cir. 1963) (en banc), *cert. denied,* 376 U.S. 938 (1964).
[52] 60 Stat. 1040 (1946), as amended, 42 U.S.C. § 291 (1958).
[53] 323 F.2d at 967.
[54] *Ibid.*
[55] 329 F.2d 710 (4th Cir. 1964) (en banc).

the expansion of the hospital plant, had continued to provide for its operational needs, had granted it a tax exemption, and had granted the hospital corporation the power of eminent domain.

Opponents of Proposition 14 suggest that unless one is prepared to say that clearing slums is less of a public purpose or less related to the maintenance of public health, the difference between hospitals and housing projects is constitutionally insignificant. They argue that the specific language of the initiative measure would immunize discrimination by any "person" who is a beneficiary of the public largesse no matter how extensive and no matter how much of a public function the beneficiary was in fact carrying out. In their view the measure would apply to situations which are constitutionally indistinguishable from the *Burton* and *Simkins* cases.

Opponents of the measure offer still more examples of constitutionally offensive applications of its terms to quasi-state entities. They claim that under the measure a company town would be permitted to discriminate with respect to the renting or leasing of any "real property" in the town, and that such action would be state action and violative of the equal protection clause.[56] Further, the modern cooperative apartment house or the condominium are claimed to encompass many of the quasi-governmental functions of the company town, especially if developed on a large scale. The extensive powers given large tract developers in building complete communities are argued to verge on the governmental function, especially where aided by powers of eminent domain.

Supporters of Proposition 14 reply that the measure is to be interpreted consistently with the fourteenth amendment and will not permit a property owner to pursue a discriminatory policy if he is prohibited from doing so by the dictates of the fourteenth amendment.

Interpretation by the Courts

The interpretation of the breadth of Proposition 14 undoubtedly will be undertaken by the California courts.[57] It also would appear that under the abstention principle it will be for the California courts in the first instance to determine whether the measure is simply an expression of neutrality on the part of the State or whether it is an affirmative statement of a policy of permissive discrimination based

[56] *Cf.* Marsh v. Alabama, 326 U.S. 501 (1946).

[57] See NAACP v. Bennett, 360 U.S. 471 (1959); Harrison v. NAACP, 360 U.S. 167, 176 (1959); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); Note, *Federal Jurisdiction: Recent Developments in the Abstention Doctrine*, 47 CALIF. L. REV. 943 (1959).

on race. If it is interpreted to be such an affirmative statement and is therefore held to be on its face violative of the fourteenth amendment, there should be no need for further inquiry. If the measure is not held to be unconstitutional on its face, the next inquiry of the court will be whether it is unconstitutional as applied in specific situations. When faced with the possible application of the measure in an unconstitutional manner the court may adopt a narrow interpretation in order to avoid the constitutional question. Under such an interpretation the measure would be deemed to apply only to those factual situations where its application would not violate the fourteenth amendment.

The attitude of the California courts toward the construction of statutory (and presumably State constitutional) provisions[58] is expressed in the early case of *French v. Teschemaker*.[59] The court stated:

> where the language used is unambiguous, and the meaning clear and obvious, an unconstitutional consequence cannot be avoided by forcing upon it a meaning, however plausible it may be, which is, upon a fair test, repugnant to its terms. But if the language upon its face is ambiguous and susceptible of different constructions, it may be forced, so to speak, to the extent of adopting the less obvious construction, in order to uphold the law. All doubts are to be resolved in favor of and not against the validity of the statute.[60]

Characterization of language as clear and unambiguous on its face will of course vary from judge to judge, and the tests quoted may be used to justify almost any form of construction except in a few instances where the language of the statute is utterly clear. Thus in the *French* case a State statute provided that a municipality would not be liable for the debts of a corporation in which it subscribed stock. The statute was read as limited to a direction that such exception from liability be obtained by contract between the municipality and the corporation rather than as a rule of law which admittedly would have been unconstitutional. In *County of Los Angeles v. Riley*[61] a State statute granted tax money to municipalities but failed to restrict the use of such money to State purposes. It was admittedly unconstitutional unless a limitation to State purposes could be read into the statute. The court, quoting from *County of Los Angeles v.*

[58] The California Supreme Court has stated that the presence of a severability clause is an invitation to the reviewing court to construe a measure to be constitutional. *In re* Blaney, 30 Cal. 2d 643, 655, 184 P.2d 892, 900 (1947). Proposition 14 contains a severability clause.

[59] 24 Cal. 518 (1864).

[60] *Id.* at 554.

[61] 6 Cal. 2d 625, 59 P.2d 139 (1936).

Legg,[62] read in the limitation, stating: "If the terms of a statute are by a fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution."[63]

Under the foregoing principle Proposition 14 may be read as a command to the State and its subdivisions and agencies not to deny, limit or abridge only such "rights to discriminate" as persons may possess under the federal constitution. Thus, if the fourteenth amendment requires a particular property owner to pursue a non-discriminatory policy, actions against him will not be barred by the measure because that owner will have no "right to discriminate." Stated differently, the measure may be read as immunizing discrimination only by persons presently prevented from doing so solely by State law. It is obvious that as a practical matter the result will be the same whether the measure is interpreted not to apply to those prohibited from discriminating by the fourteenth amendment or is held to be unconstitutional as so applied.

Practical Legal Effects

Opponents of the measure have argued that if it is not struck down as unconstitutional it will have disruptive commercial effects far beyond those contemplated by its proponents. The authors doubt that the courts will interpret the measure so broadly as to produce the anticipated results. However, regardless of the final outcome, enterprising defense counsel may seek refuge in the measure in a variety of cases. Until every such effort has been rejected by the courts, areas of legal doubt and confusion may exist. The final portion of this article briefly discusses some of the possible disruptive commercial effects.

It has been suggested that Proposition 14 will destroy mutuality of contract, thereby preventing specific enforcement of real estate contracts. Civil Code section 3386 prevents either party to a contract from compelling the other party to specifically perform it unless the party seeking enforcement has performed or is compellable specifically to perform.[64] It is argued that if a real property owner enters into an

[62] 5 Cal. 2d 349, 55 P.2d 206 (1936).

[63] 6 Cal. 2d at 629, 59 P.2d at 141. See also Shealor v. City of Lodi, 23 Cal. 2d 647, 145 P.2d 574 (1944).

[64] "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." CAL. CIV. CODE § 3386.

agreement with a buyer or enters into a lease and then decides to abrogate his agreement, he will be able to do so under the measure. Similarly it is argued that the absence of mutuality should prevent the seller or lessor from enforcing the agreement against an unwilling buyer or tenant. Critics of this argument suggest that the courts will interpret the measure so that any property owner who enters into an agreement either will be deemed to have waived his "right to decline" or to have thereby constructively sold, leased or rented his property at the time of execution so as to have no further property right to sell, lease or rent.

Under Probate Code sections 780-85 real estate assets of a decedent must be sold to the highest responsible bidder. It has been argued that Proposition 14 would vitiate the applicable Probate Code sections and would remove all power of the probate court to force an executor to sell to anyone whom he chooses to reject. Such a result might prevent the decedent's heirs from getting top dollar for estate property, and opponents of the measure assert that its passage would discourage attendance by potential bidders at probate sales. Critics of this argument suggest that it is subject to the same fatal defects as the preceding argument.

Civil Code section 2362(1) now requires a public auctioneer to sell only to the highest bidder, in the absence of special authorization.[65] Proposition 14 has been interpreted by its opponents as removing that obligation with respect to real property. They claim that confidence in—and attendance at—auctions will thereby diminish significantly. In rebuttal, it has been argued that once the auctioneer is engaged the owner has granted him the sole power to sell or refuse to sell, and that no auctioneers will risk destruction of their institution by reneging on their obligation to sell to the highest bidder.

Opponents of the measure have suggested that since it will permit an owner-principal to refuse to sell to a willing buyer whom the broker has obtained the broker's commission will be in jeopardy. On the other hand it has been argued that the danger appears to be non-existent in fact, since either by express provision in the listing agreement or by implied contract the broker could protect his right to recover his commission upon his presentation to the owner of a willing and able buyer.

Since a security interest related to a real estate loan also consti-

[65] "An auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller, only as follows: 1. To sell by public auction to the highest bidder . . . ." CAL. CIV. CODE § 2362(1).

tutes "real property," (although a more limited interpretation of the definition of real property set forth in the measure is possible) opponents of the measure argue that prospective mortgagors may be free to renege on their commitments to borrow and, as a result of Civil Code section 3386, prospective lenders may be afforded the same opportunity to renege because of lack of mutuality of loan agreements.[66] Critics of this argument state that it is no different from nor more valid than the argument with respect to real property contracts and probate sales.

It has also been argued that passage of Proposition 14 would deny California access to all future federal urban renewal funds and result in a serious blow to the development of California cities. Both the Administrator[67] and the General Counsel[68] of the Federal Housing and Home Finance Agency have stated that in their opinions there would be "serious questions" regarding future urban renewal programs in California if Proposition 14 is passed. Regulations promulgated by the Urban Renewal Administration pursuant to Executive Order 11063[69] require state and local public agencies, as a condition to receiving urban renewal assistance, to agree to impose nondiscrimination requirements in deeds to private developers. It is argued that Proposition 14 would prohibit such agencies from imposing such requirements because it would prevent them from "limiting" the "absolute discretion" of the private developers; therefore, the Urban Renewal Administration could not provide financial assistance.

It is argued in rebuttal that although the literal language of the measure would appear to prohibit local public agencies from imposing such requirements, it would be interpreted to mean that there was no "limitation" *by* the public agency of the developer's "absolute discretion" where the developer agreed to accept such conditions in order to enjoy the benefits of the project. Further, it is suggested that the fourteenth amendment may render the measure inapplicable under the reasoning discussed in an earlier part of this article.

Conclusion

It is probable that many members of the general public will look to the bar for advice and assistance in evaluating Proposition 14. In

[66] See note 62 *supra.*

[67] Letter from Administrator Robert C. Weaver to Congressman Augustus F. Hawkins, Jan. 16, 1964.

[68] Letter from General Counsel Milton P. Serner to Charles E. Bosley, Administrative Assistant to Senator Clair Engle, March 13, 1964.

[69] See note 47 *supra.*

fact, some local bar associations have spoken out in opposition to it,[70] and even more recently the Conference of Delegates of the State Bar of California overwhelmingly voted approval of a measure recording their opposition to the measure. Other associations have remained silent, apparently because the measure has been viewed solely as raising "political" or "moral" issues. The preceding discussion should dispel that illusion. While it may be proper for a bar association to refuse to commit itself to support of or opposition to Proposition 14 when its membership is split on the moral aspects of the measure (which propriety the authors do not necessarily concede), it is submitted that every bar association in the State should inform their local communities about those aspects of the measure which are peculiarly within the area of competence of attorneys, *i.e.*, the effect of the measure upon existing State and local law and upon future legislative and executive programs, and the practical legal effects which might result from passage of the measure. The authors hope that this article will be of some assistance in this regard.

[70] Palo Alto Bar Association; San Mateo County Bar Association; Santa Clara County Bar Association.